

No. 12,228

IN THE
United States
Court of Appeals
For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

FILED
APR 14 1950

SAMUEL TAYLOR,
EDGAR SINTON,

Counsel for Petitioner.

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PETITION FOR REHEARING

The court has granted until April 17, 1950 in which to
e this petition for rehearing.

GROUND FOR PETITION

The decision of this court was in error in failing to
mand the case to the Tax Court for further considera-
on. Such remand is required under the rule laid down in

Helvering v. Taylor (1935) 293 U.S. 507 and followed the cases cited on pages 42-43 of petitioner's opening brief. Even assuming that petitioner failed to establish the applicability of the 1937 Standard Annuity Mortality Table and of the petitioner's quarterly factor, nevertheless the uncontradicted evidence in this case established that the Commissioner's use of the Actuaries' or Combined Experience Mortality Table and of the Commissioner's quarterly factor was erroneous, or, in the words of *Helvering v. Taylor*, arbitrary and invalid.

ARGUMENT

Before this court, petitioner contended that the life estate of Estelle W. Koshland should be valued upon the basis of the 1937 Standard Annuity Mortality Table and upon the basis of petitioner's quarterly factor. This court in its decision sustained the refusal of the Tax Court to adopt this contention.

Petitioner further contended before this court that even assuming that the Tax Court did not err in failing to adopt the 1937 table and petitioner's quarterly factor, nevertheless it erred in valuing the life estate upon the basis of the Actuaries' or Combined Experience Mortality Table and upon the basis of the respondent's quarterly factor.

In this petition, petitioner requests this court to reconsider its decision upon the second point and to remand the case to the Tax Court for further hearing.

Assuming, as this court decided, that the uncontradicted evidence does not sustain petitioner's contention that the 1937 table and the petitioner's quarterly factor should be used, it clearly shows that the Actuaries' or Combined

Experience Mortality Table is obsolete and that the respondent's quarterly factor is erroneous.

In addition to the evidence analyzed in detail in the petitioner's brief (particularly at pages 7-40 thereof which petitioner respectfully requests this court to re-examine) and in the petitioner's reply brief, the Treasury Department has, since this court rendered its decision in this case, itself recognized the obsolescence of the over-a-century-old Actuaries' or Combined Experience Mortality Table. The following correspondence is indicative of this fact.

Airmail

November 22, 1949

Vance Kirby, Esq.
Legislative Counsel
Treasury Department
Washington, D. C.

Dear Mr. Kirby:

Confirming our telephone conversation of this date, I would appreciate your advising me whether the Treasury Department has under consideration a proposed revision of section 81.10(i)(3) of the Estate Tax Regulations, Treasury Regulations 105. The section mentioned provides for the valuation of life estates upon the basis of the Actuaries' or Combined Experience Table of Mortality. It is my understanding that the Treasury Department has under serious consideration the substitution of a more modern table of mortality for the table used in the Regulations. Would you kindly advise me whether this understanding is correct and whether a recommendation for a change is likely to be made in the near future? A reply by airmail would be appreciated.

Sincerely yours,

/s/ Samuel Taylor

General Counsel
Treasury Department
Washington

November 30, 1949

Dear Mr. Taylor:

This is in reply to your letter of November 2, 1949 addressed to Mr. Kirby, in which you inquire whether the Treasury Department has under consideration a proposed revision of section 81.10(i)(3) of Treasury Regulations 105, which provides for the valuation of life, remainder, and reversionary interests upon the basis of the Actuaries' or Combined Experience Table of Mortality, as extended, and an interest rate of 4% a year.

The Department is considering the adoption of a more modern table of mortality for estate tax valuation purposes. Since the study of this and related problems, including the suitability of the 4% interest rate, has not been concluded, it is difficult to forecast when a change is likely to be made. It is probable that any change to be made will be prospective only and will in no way affect the estate tax liabilities of estates of decedents dying prior to the adoption of the new regulation. However, prior to the final adoption of a new regulation, public notice will be given in the Federal Register in order that interested persons may have an opportunity to submit their views and comments.

Sincerely yours,

/s/ Thomas J. Lynch
General Counsel

Samuel Taylor, Esquire
1211 Balfour Building
San Francisco 4, California

Whether the change which the Treasury will make in the regulations will be prospective only or will apply retroactively is not the significant point. The significant point is that the Actuaries' or Combined Experience Mortality Table is so obsolete that in the words of its General Counsel, "The Department is considering the adoption of a more modern table of mortality for estate tax valuation purposes." The uncontradicted evidence in this case shows that the Actuaries' or Combined Experience Mortality Table, first published in 1843, has been obsolete since at least 1900 (R. 93). The point, therefore, is that even assuming that petitioner has failed to establish the applicability of the 1937 table, it has nevertheless established the obsolescence and hence non-applicability of the 1843 table.

Likewise, assuming that the petitioner has failed to establish that its quarterly factor is the proper quarterly factor, it has established that the Commissioner's quarterly factor is erroneous. In this regard petitioner respectfully requests this court to examine again pages 29 to 40 of its opening brief.

Under these circumstances, the decision of the Tax Court should be reversed, and the case remanded for further proceedings. See *Helvering v. Taylor* (1935) 293 U.S. 507 and the Court of Appeals cases cited on pages 42 and 43 of the petitioner's opening brief. To the same effect, see also two decisions of Courts of Appeal which have been published since the decision of this court, namely, the decision of the Court of Appeals for the Second Circuit in *Wodehouse v. Commissioner* (November 2, 1949) 177 Fed.(2d) 881, and the decision of the Court

of Appeals for the Tenth Circuit in *The Federal National Bank of Shawnee, Oklahoma v. Commissioner* (February 13, 1950) Fed.(2d)

Upon a petition to review a decision of the Tax Court this court has the power under Internal Revenue Code Section 1141(c)(1) “* * * to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.” In determining what justice requires, this court should consider not only that the uncontradicted record in this case establishes the obsolescence of the respondent's 1843 mortality table and the erroneousness of his quarter factor, but that the Commissioner has now, by commencing consideration of the adoption of a more modern mortality table, himself recognized that the use of his table has been erroneous, or, in the words of *Helvering v. Taylor*, arbitrary and invalid.

Respectfully submitted,

SAMUEL TAYLOR,

EDGAR SINTON,

Counsel for Petitioner

Dated: April 12, 1950

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner hereby certify that in their judgment this petition for rehearing is well founded and that it is not interposed for delay.

SAMUEL TAYLOR,

EDGAR SINTON,

Counsel for Petitioner